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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THV INVESTMENTS, LLC, Plaintiff and Appellant, v. DAVID A. ROBERTS et al., Defendants and Respondents.	E065126 (Super.Ct.No. RIC1214307) OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia and Richard J. Oberholzer, Judges.* Reversed.

Law Offices of Robert A. Brown and Robert A. Brown; Law Offices of Lyle F. Middleton and Lyle F. Middleton for Plaintiff and Appellant.

Clifford & Brown, Arnold J. Anchordoquy, T. Mark Smith and Dennis P. Gallagher for Defendants and Respondents.

* Judge Oberholzer is a retired judge of the Superior Court of Kern County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Plaintiff and appellant THV Investments, LLC, (THV) appeals the judgment in its legal malpractice action against defendants and respondents David A. Roberts (Roberts) and Caswell Bell & Hillison, LLP, (collectively defendants) an attorney and his law firm. In 2007, THV obtained a construction loan from 1st Centennial Bank (the Bank) and purchased real property (as a recorded subdivision consisting of 16 lots plus all engineering plans approved by the City of San Jacinto (the City)) from Ronald Clark (later, the Clark Family Trust dated Oct. 25, 2000 (the Clark Trust)) and Ernesto R. Ruiz (Ruiz) for a residential development project. Because the recorded tract map was defective, THV incurred significant delays in the project causing it to default on the construction loan and lose the property through nonjudicial foreclosure. THV hired defendants to negotiate an extension on the loan due date, challenge the Bank's nonjudicial foreclosure, and initiate legal action against all parties responsible for the delays in the project.

Unhappy with the outcome of defendants' representation, THV sued them for legal malpractice alleging (1) Roberts failed to sue all parties responsible for the defective tract map causing THV to suffer $2.4 million in damages, and (2) Roberts' advice regarding THV's members' personal guarantees on the construction loan caused THV to suffer $250,000 in damages. Following a jury trial, THV was awarded $250,000 in damages; however, the trial court granted defendants' motion to offset the award, reduced the award to $0, and declared defendants to be the prevailing party.

THV appeals, contending the trial court abused its discretion when it admitted expert testimony "about the law" and when it excluded the recorded conversation

between the members of THV and Roberts. THV also asserts the court erred in modifying a special jury instruction with its response to the jury's questions, in refusing to instruct the jury on a sham guaranty, and in granting defendants' motion to offset the damages award.

We conclude the trial court prejudicially erred in instructing the jury. While our conclusion on this issue requires reversal of the judgment and remand for a new trial, we reach the merits of each of the issues raised to provide guidance on retrial. (*Dinkins v. American National Ins. Co*. (1979) 92 Cal.App.3d 222, 234 ["For the purpose of providing guidance to the court on retrial, we review defendant's claim that the court erred in awarding attorney fees with respect to that part of the judgment granting plaintiff contractual relief under the policy and damages for emotional distress."].)

I. PROCEDURAL BACKGROUND AND FACTS

A. THV Obtains a Construction Loan for a Real Estate Development Project.

In 2005, James Tutt (Tutt), his daughter Joy Vincent (Vincent), and friend Dr. Alan Hedberg (Hedberg) discussed investing in a real estate development project. In September 2005, Tutt and his wife, Jane Tutt, entered into a purchase and sale agreement and joint escrow instructions (the contract) with the Clark Trust and Ruiz to purchase real property in San Jacinto, California (the Property) for $1,040,000.[1] According to the

[1] The purchase price was later reduced to $990,000 because the sellers were unable to close escrow on time.

contract, the sellers were to provide "a parcel of land, consisting of sixteen (16) 'RECORDED LOTS' . . . located . . . [in the] City of San Jacinto . . . and more fully described as: Tract Map # 32656." That same month, Tutt and Vincent met with Christie Longsford[2] of the Bank to obtain financing. Following their meeting, Tutt and Vincent opened escrow with a $100,000 down payment supplied by Tutt, Vincent, and Hedberg. Subsequently, Tutt and Vincent obtained a loan package and provided the Bank with their personal financial information. On October 17, 2005, THV was incorporated as a limited liability corporation (LLC).[3] The Bank tentatively approved a construction loan of $2.4 million.

Prior to the close of escrow, the Bank required additional capital investment by THV, and personal guarantees by each member of the LLC. Three new members were added to THV: John Wood, Robert Sherman, and Gary Whipple. The Tutts assigned their right to purchase the Property to THV. Escrow closed and loan documents (promissory note, construction agreement, & commercial guarantees) were simultaneously signed on June 20, 2007, shortly after the tract map was recorded. The Bank's one-year loan amount was $2,145,000. THV paid $537,000 toward the purchase of the Property, with the Bank loaning the remaining $453,000.

Within 48 hours of closing escrow, THV began construction; however, by the end of August 2007, Tutt discovered that the final tract map drafted by Alejandro Alatorre of

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[2] The reporter's transcript also states Christie Lunsford.

[3] It was disputed at trial whether the Bank required the formation of an LLC or corporation to obtain the loan.

Alatorre & Associates (Alatorre) and approved by the City was defective. All survey and engineering work had to be redone and resubmitted to the City for approval. Tutt apprised the Bank of what was happening, and the Bank officials assured Tutt that they understood and "were completely behind" him. Nonetheless, further delays resulted in the loss of the entire project.

In April 2008, the Federal Deposit Insurance Corporation (FDIC) audited the Bank. Shortly thereafter, the Bank stopped funding THV's project, refusing to honor any vouchers for payment. THV hired Roberts, who obtained a 90-day extension of the loan's June 20, 2008 due date. Nonetheless, THV was unable to repay the loan on September 20, 2008, and the Bank initiated foreclosure proceedings in October 2008.

B. THV Seeks Legal Counsel.

Sometime prior to November 2008, Tutt met with Roberts regarding his concerns about: (1) the delays in construction due to the defective tract map; (2) the Bank's refusal to honor construction vouchers from Spring 2008 to September 20, 2008; and (3) the members' liability on the personal guarantees. The two discussed filing a lawsuit, who to sue, and whether or not Alatorre had liability. Tutt wanted to sue everyone, including the Bank, Ruiz, the Clark Trust, Alatorre, Greg Lehr (the surveyor who plotted and staked the survey), the City, Tri Lakes Engineering (independent contractor hired by the City to check tract maps (Tri Lakes)), and any other party that may have contributed to THV's loss.

Roberts did not recommend suing any party other than the sellers. He explained it would be problematic for THV to sue Alatorre under either a third party beneficiary

theory or a professional negligence theory because THV did not have a contract or agreement with Alatorre. As for the Bank, Roberts determined it would not be feasible for THV to sue the Bank because of the provisions of the loan agreement. Instead, according to Roberts' "game plan," THV would sue the sellers, who would cross-complain against Alatorre. Then THV would settle with the parties and use the settlement money to pay the debt owed to the Bank based on the personal guarantees. Roberts did not file a claim with the City. According to Tutt, Roberts said THV could not sue "a city entity," or Tri Lakes because Tri Lakes was "an agent of the city."

C. The Bank Sues the Members of THV.

On January 7, 2009, the Bank sued the six members of THV based on their personal guarantees on the construction loan, exposing them to liability in excess of $1 million (*1st Centennial Bank v. Gary Whipple, et al.*, Super. Ct. San Bernardino, No. CIVDS90076 (the Bank action)). Roberts, on behalf of the members, filed an answer and cross-complaint against the Bank. Prior to filing the cross-complaint, Roberts advised the members that the prospect of success on the cross-action was not high, but it would slow things down so the members could better negotiate a settlement. After the Bank action was filed, the FDIC took over the Bank and the lawsuit against the

members. Because of the takeover by the FDIC, the *D'Oench, Duhme*[4] doctrine applied. On April 1, 2011, six months prior to the October 3, 2011 trial date in the Bank action, the Property was foreclosed upon by a nonjudicial foreclosure sale.

In a July 7, 2011 letter, Roberts informed THV that a motion for summary judgment (MSJ) had been filed by the Bank, and it was doubtful the motion could be defeated. Roberts stated his law firm needed an immediate $21,000 it was owed, $40,000 to $50,000 to "present a meaningful opposition," and $30,000 to $40,000 to take the matter to trial. In a July 27, 2011 e-mail, Roberts wrote that any chance of defeating the MSJ required discovery, and it might be difficult to find some of the Bank employees who needed to be deposed. As of the date of the e-mail, no discovery had been conducted.

Also, during July 2011, Roberts participated in a telephone conference call[5] with all of THV's members. In the call, Roberts advised the members to seek bankruptcy protection because the lawsuits would go away if each of them filed a "Chapter 7

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[4] *D'Oench, Duhme & Co. v. F.D.I.C.* (1942) 315 U.S. 447. The *D'Oench, Duhme* doctrine is partially codified in Title 12 United States Code section 1823(e). (*Weber v. New West Federal Savings & Loan Assn.* (1992) 10 Cal.App.4th 97, 99 (*Weber*).) Section 1823(e) "is a section of the Federal Deposit Insurance Act which invalidates certain agreements between a bank and its obligor(s) that tend to diminish the interest of the Federal Deposit Insurance Corporation (FDIC) in assets acquired by it in its corporate capacity. In sum, section 1823(e) provides that unless a bank and its borrower(s) execute a written agreement which has gone through all the normal approval processes of the bank, and said agreement is a part of the bank's records, the FDIC is not required to honor the agreement when it takes over the assets of the bank, should the bank fail." (*Weber*, at p. 99.)

[5] One of the members of THV recorded the conference call without Roberts' knowledge. The trial court denied the request to admit the recording into evidence.

bankruptcy." On July 28, 2011 (with a response to the MSJ due by Aug. 16, 2011), Roberts provided substitution of attorney forms to each of THV's members, notifying them that his firm was withdrawing as attorney of record. THV and its members hired new counsel who successfully defeated the MSJ.

On October 3, 2011, the members' cross-complaint was dismissed on the eve of trial, pursuant to a motion for judgment on the pleadings on the grounds the cross-complainants had not exhausted their administrative remedies by filing a timely claim with the FDIC, and they lacked standing because THV was the real party in interest. The case settled for $250,000, a sum provided by THV member Hedberg.

D. THV Sues Ruiz and the Clark Trust Based on the Defective Tract Map.

On January 14, 2009, THV sued Ruiz and the Clark Trust for breach of contract and negligence (Super. Ct. Riverside County, No. RIC518089 (the Property action)). Ruiz and the Clark Trust filed a cross-complaint against Alatorre for breach of contract and indemnity. No party sued Lehr, Tri Lakes, and the City, based on the defective tract map, or the Bank, based on its refusal to pay vouchers the last few months prior to the construction loan's due date.

In or about March 2012, THV entered into a good faith settlement with Ruiz, with a dismissal of the Clark Trust due to bankruptcy. THV and Ruiz entered into a stipulation for entry of judgment against Ruiz in excess of $1.4 million and an assignment of the right to bring an action for bad faith settlement against Ruiz's insurance carrier, Lloyd's of London. Separately, THV settled with Alatorre through a good faith settlement for $400,000.

E. THV Sues Defendants in Two Separate Legal Malpractice Actions.

On September 21, 2012, THV[6] initiated this action for legal malpractice (Riverside action) against defendants alleging negligence and breach of fiduciary duty in their representation of plaintiffs in the Property action and in *Hilkema v. Ruiz et. al.*, Superior Court of Riverside County, No. RIC540994 (*Hilkema* case).[7] THV claimed defendants negligently failed to sue all the parties responsible for THV's $2 million-plus damages in the Property action. THV's complaint specifically identified Alatorre as an

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[6] James and Jane Tutt were also identified as plaintiffs; however, they subsequently requested dismissal of their claims without prejudice.

[7] The record is confusing as to whether the Riverside action includes THV's legal malpractice claims against defendants arising from Roberts' advice regarding the members' personal guarantees and representation in the Bank action. In its opening brief, THV states it sued defendants for legal malpractice based on negligence and breach of fiduciary duties in two underlying cases: the Bank action and the Property action. The complaint, however, states THV sued defendants based on their legal representation in the Property action and the related *Hilkema* case. There is no mention of the Bank action in the complaint. During its opening statement, THV did not reference the Bank action or its members' personal guarantees, limiting its reference to the Bank's failure to advance funds and honor THV's construction vouchers from Spring 2008 to September 20, 2008. In contrast, defendants referenced the Bank action, specifically Roberts' decision not to sue the Bank based on THV's members' personal guarantees.

During trial, the parties introduced evidence that the Bank required THV's members to personally guarantee the loan, the Bank foreclosed on the Property in a nonjudicial foreclosure sale, and the Bank settled its claim on the personal guarantees for $250,000 (evidence concerning the Bank action), in addition to the evidence that the Bank refused to honor THV's construction vouchers from Spring 2008 to September 20, 2008 (evidence concerning the Property action).

However, in closing argument, THV again failed to mention the Bank action or its members' personal guarantees, arguing Roberts should have sued the Bank for breach of contract based on breaching "its obligation to do loan extensions under the specific terms in order to act in good faith." It was only after defendants referenced the members' personal guarantees that THV responded by arguing defendants are liable because "there was no personal liability" on the guarantees upon judicial foreclosure of the Property.

excluded party; however, during trial, THV faulted defendants for failing to sue the City, Lehr, and Tri Lakes based on the defective tract map, and the Bank based on its refusal to honor THV's construction vouchers from Spring 2008 to September 20, 2008. Of these excluded parties, THV settled its claim against Alatorre for $400,000.

THV filed a second lawsuit against defendants in the Superior Court of Fresno County, No. 13CECG01372 (Fresno action). The Fresno action concerns Roberts' representation of THV in the Bank action, including, but not limited to, the failure to exhaust administrative claims against the FDIC, the failure to file a cross-complaint in the Bank action on behalf of THV, the failure to assert claims against the Bank's insurers, and the alleged conflicts of interest in the representation of THV and its members. The Fresno action also concerns claims that defendants negligently represented THV and its members in their dealings with the Bank and in the Bank's action on the personal guarantees, resulting in THV having to "indemnify its members on *personal guarantees*."

Specifically, THV alleges it had to pay $250,000 to indemnify its members based on their personal guarantees.[8]

Trial commenced in the Riverside action in April 2015, and a verdict was reached on or about May 27, 2015.[9] The jury found defendants' legal representation in the Property action fell below the standard of care, and their actions were a substantial factor in causing harm to THV. The jury awarded $250,000 in monetary damages.

On June 16, 2015, THV moved ex parte for entry of judgment on the jury's verdict. The trial court denied the application to allow the filing of a "regularly noticed motion for the entry of judgment," and invited defendants to file a motion for offset. On July 14, 2015, THV filed its motion for entry of judgment; however, defendants moved for an offset in the damages awarded by the amount of THV's good faith settlement with

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[8] The parties disagreed as to whether THV should raise its legal malpractice claims in the Fresno action (specifically advice regarding the members' personal guarantees) in the Riverside action. Defendants noted THV's second, separate lawsuit against defendants (the Fresno action). On August 18, 2014, THV requested the Fresno action be transferred to Riverside for coordination with the Riverside action; however, the request was denied. Despite the denial of THV's request, during trial in the Riverside action, THV asserted that "every issue that is in the Fresno case is in this case, except one." Defendants objected on the grounds discovery in the Fresno action was not complete. Over defendants' objection, the trial court allowed THV to present expert testimony on the validity of the members' personal guarantees. However, the operative pleadings, opening statement, closing argument and jury instructions before this court insinuate that THV's primary claim against the Bank in the Riverside action involves the Bank's failure to honor THV's construction vouchers from Spring 2008 to September 20, 2008, not the validity of the members' personal guarantees.

Defendants note that trial in the Fresno action is stayed pending the outcome of this appeal.

[9] Further recital of the evidence presented, along with the arguments of counsel and rulings of the trial court, will be provided within the discussion of the issues raised.

Alatorre ($400,000) and a ruling that defendants were the prevailing party. On November 6, 2015, the court granted defendants' motion, reduced the verdict to $0, and declared defendants to be the prevailing party entitled to costs.

II. DISCUSSION

THV challenges the trial court's rulings regarding the admission of evidence, its instructions to the jury, and its decision to offset the damages award.

A. General Principles of Law for Legal Malpractice Claims.

The elements of a cause of action for legal malpractice are "'(1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage.'" (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536.) "'The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.'" (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 308.)

To establish a breach, the plaintiff must show the attorney's advice was "'so legally deficient when it was given that he [or she] may be found to have failed to use "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."'" (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 397.)

To establish causation and damages, the plaintiff is required to prove that, but for the defendant's negligent acts or omissions, plaintiff would have obtained a more favorable judgment or settlement in the action in which the legal malpractice allegedly occurred. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241; accord, *DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506-1507 ["One who establishes malpractice on the part of his or her attorney *in prosecuting a lawsuit* must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements."].) This requirement essentially necessitates a "trial-within-a-trial" of the underlying case. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 832-834 [recounting the "long line of cases adopting the trial-within-a-trial method of proof when an attorney is accused of losing a client's legal claim or defense" and noting that "[c]ertainly to date, no other approach has been accepted by the courts"].)

B. The Trial Court Did Not Abuse Its Discretion in Its Evidentiary Rulings.

THV contends the trial court abused its discretion when it admitted expert testimony "about the law" and excluded the recorded conversation between the members of THV and Roberts. As we explain, we reject THV's contentions.

1. Admission of expert testimony.

a. Further procedural background and facts.

Both sides moved in limine to preclude expert testimony. THV sought to preclude "all expert opinion testimony of defendant, Roberts" and the expert testimony of defense expert Charles Hansen (Hansen), "including without limitation his embellishments in

testimony, as well as being critical of [THV's] current attorneys." Defendants sought to preclude plaintiff's expert, Alan D. Wallace (Wallace), from testifying about litigation matters and strategy on the grounds he lacked the necessary qualifications because he "has never been a litigator, tried a case, filed a complaint, or even deposed a person." The trial court denied the motions as to Wallace and Hansen, but granted as to Roberts, stating he would "not be allowed to render expert opinion as to anybody else's testimony or hypotheticals, . . . and things of that nature."

Regarding THV's claim that defendants negligently failed to sue Alatorre and other parties in the Property action, THV's counsel questioned Roberts about the law of contracts, third party beneficiary principles, privity of contract, civil procedure, the law regarding the "determination of the duty of licensed professionals to a third party in the absence of a contract with the third party," and his decision not to sue Alatorre. Further, THV's counsel asked in depth questions about the law of negligence and the rules set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) and *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*).[10] Roberts explained his understanding of the tort theory of the law regarding third party beneficiary and negligence claims, in relation to THV's options in the Property action, specifically as to his decision to sue only the parties to the

[10] These cases set forth a checklist of factors to consider in assessing the legal duty of a defendant to a plaintiff in the absence of contractual privity between the two. (*Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152, 164-165.)

contract to purchase the property, which did not include Alatorre, Tri Lakes, Lehr, the City or the Bank directly.

Hansen opined that Roberts' legal representation did not fall below the standard of care when he only named Ruiz and the Clark Trust in the Property action. Hansen explained that a lawyer must consider issues of law in developing a correct analysis. He provided his opinion as to "settled law" regarding the tort theory of negligence and application of the *Biakanja* factors in deciding whether to sue those who were not parties to a contract.[11] When defense counsel repeatedly objected on the grounds THV was inquiring "far beyond the standard of care testimony," the trial court overruled the objections and allowed Hansen to provide detailed explanations of the legal precedent underlying his opinions. Hansen further opined that dismissing the Clark Trust from the Property action was necessitated by the bankruptcy.

THV's counsel also interrogated Roberts on the rule of law regarding "enforcement of a personal guarantee on a note and deed of trust secured by a real property investment." Roberts testified to his understanding of guaranty/suretyship law as it related to THV's members guaranteeing the Bank's loan, the viability of a sham guaranty defense, and the availability of any claims against the Bank based upon the antideficiency statutes. (Civ. Code, § 2856.) The trial court repeatedly noted that

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[11] "The *Biakanja* factors are six nonexhaustive factors: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 899.)

Roberts was setting forth his "thought process" and "his analysis of what he did," and that THV's counsel asked Roberts to "define several legal terms." The court ruled that in the law's gray area, the experts could opine as to whether defendants followed the standard of care. Roberts also testified as to his understanding of the implications of the FDIC taking over the Bank action.

Similarly, on both direct and cross-examination, Hansen testified about guaranty law, opining that the THV members' liability for the loan was based on their guaranteeing its payment, not on their being members of THV, and that the law in *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40, 43 (*Gradsky*) (interpreting Code Civ. Proc., § 580d in context of its effect on ability of lender to pursue guarantor following trustee's sale) was legislatively disapproved with the enactment of Civil Code section 2856.

THV's counsel questioned Wallace about his legal opinions regarding the sham guaranty doctrine, antideficiency statutes, and *Gradsky* waivers,[12] eliciting Wallace's explanation of the antideficiency statutes and opinions regarding many hypotheticals. When asked about an action against Alatorre and others, Wallace opined that Alatorre could be sued directly under the *Biakanja/Bily* theory.

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[12] Civil Code section 2856 "permit[s] a guarantor to waive certain legal and statutory defenses, as specified in the code which would otherwise be available" (*California Bank & Trust v. DelPonti* (2014) 232 Cal.App.4th 162, 167), including the one-action rule and antideficiency protections. *Gradsky* held that a lender is estopped from seeking to recover a deficiency against a guarantor after electing to proceed by a nonjudicial foreclosure sale, because this election destroys the guarantor's subrogation rights against the principal debtor. (*Gradsky, supra*, 265 Cal.App.2d at p. 41.) A "*Gradsky*" waiver is a provision in a guarantor waiving a defense based on the holding in *Gradsky*. (*Cadle Co. II v. Harvey* (2000) 83 Cal.App.4th 927, 930-931.)

b. THV's contentions.

THV faults the trial court for admitting testimony from Roberts and Hansen "about the law" and allowing them to "giv[e] legal opinions" on three broad issues: "determination of the duty of licensed professionals to a third party in the absence of a contract with the third party," "assets in bankruptcy," and "enforcement of a personal guarantee on a note and deed of trust secured by a real property investment." Roberts testified about his understanding of the law, along with his legal recommendations and actions, while Hansen opined that Roberts' recommendations and actions did not fall below the standard of care based on the applicable legal principles. We conclude the trial court did not abuse its discretion in allowing their testimony. Alternatively, even if we concluded otherwise, THV has failed to show prejudice.

c. Standard of review.

Expert testimony is generally admissible in legal malpractice cases to resolve the factual issue of whether an attorney adhered to the standard of care. (*Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647-648; *Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 377 [error to exclude expert opinion on strategic decisions made by defendant attorneys].) "We review the court's admission of expert testimony for clear abuse of discretion, looking to whether the court's ruling 'exceeded the bounds of reason.' [Citations.] 'As a general rule, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." [Citation.] Additionally, in California, "testimony in the form of an opinion that is otherwise admissible is not objectionable

because it embraces the ultimate issue to be decided by the trier of fact." [Citation.] However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes.'" (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972 (*Piscitelli*).)

d. Analysis.

Relying on *Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, at pages 1178-1181, and *Piscitelli*, *supra*, 87 Cal.App.4th at page 974, THV argues that no witness, even an attorney, is permitted to give opinions of rules of law to the jury. We find these cases to be distinguishable: *Summers v. A.L. Gilbert Co*., at pages 1159-1160, is not a legal malpractice case, and expert testimony is necessary to educate the jurors about the underlying factual and legal issues and assist them in deciding the requisite standard of care. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810-811.) *Piscitelli*, at pages 973-974, involved an expert who was permitted to testify on the ultimate issue of causation, namely, whether the client would have prevailed in an underlying arbitration. As previously noted, expert opinion is admissible in legal malpractice cases to establish whether the attorney met the applicable standard of care. (See, e.g., *Wilkinson*, *supra*, 116 Cal.App.3d at p. 648 ["[s]ince there was no such expert testimony, there is no evidence from which the trier of fact could have found negligence on the part of respondent"]; 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 291, p. 367 ["The fact of breach is proved by expert opinion on whether the attorney followed the standards of skill and diligence prevailing in the profession."].) In contrast here, the challenged testimony

constituted admissible opinions relating to the applicable standard of care and whether defendants had met it.

To the extent the expert witnesses opined on the rules of law, we find that THV may not complain because it is responsible for the admission of such evidence by directly eliciting it from its own expert Wallace,[13] or through Roberts[14] and Hansen[15] when asking in-depth questions regarding the law of negligence, the rules set forth in *Biakanja* and *Bily*, and the law relating to a suretyship guaranty and a sham guaranty, so as to elicit expert opinion on Roberts' recommendations and actions on behalf of THV and its members. Having "opened the door" on expert testimony regarding rules of law, THV is estopped from asserting it as a ground for reversal under the doctrine of invited error. "If an appellant offers inadmissible matters into evidence, he cannot complain of its admission on appeal." (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555 ["Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal. This application of the estoppel principle is generally known as the doctrine of invited error."]; see *Gjurich v. Fieg* (1913) 164 Cal. 429, 433.)

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[13] For example: "Can you explain . . . in a nutshell what is the protection afforded under the antideficiency statute for loans secured by real estate?"

[14] For example: "What do you mean by 'third-party beneficiary'?" "[I]n order for THV to sue Alatorre in negligence, was it necessary for there to have been a contract, privity of contract, between THV and Alatorre?"

[15] For example: "If Mr. Roberts told Tutt . . . [¶] . . . that THV could not legally sue Alatorre because there was no contract, . . . [¶] . . . do you agree that Mr. Roberts was misstating settled law in California?"

Moreover, as to the rule of law regarding "the duty of licensed professionals to a third party in the absence of a contract with the third party," the trial court instructed the jury with special instruction No. P-3, along with CACI No. 219 (expert witness testimony), CACI No. 220 (experts—questions containing assumed facts), and CACI No. 221 (conflicting expert testimony). Special instruction No. P-3 provides: "A professional person may be held liable to third persons who suffer damage proximately caused by the negligence of the professional person as an independent contractor in the performance of his professional duties even though there is no privity of contract between the third person and the professional person." Regardless of the experts' testimony on this area of the law, we presume the jury followed the trial court's instructions. (*People v. Williams* (2015) 61 Cal.4th 1244, 1279.)

Notwithstanding the above, assuming the trial court abused its discretion in allowing the challenged expert testimony, THV has failed to show prejudice. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); Code Civ. Proc., § 475.) The jury was free to reject the opinions of Roberts or Hansen, believe them, or weigh them against that of Wallace. Despite the admission of the challenged expert testimony, the jury found in favor of THV. (Cf. *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480 ["trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred"].)

2. Exclusion of the recorded telephone conversation.

THV contends the trial court abused its discretion in refusing to admit the surreptitiously recorded conference call between Roberts and the members of THV. We find no abuse of discretion.

a. Further procedural background and facts.

In July 2011, Roberts and the members of THV participated in a telephone conference call. In that call, Roberts advised them to seek bankruptcy protection because the lawsuit would go away if each of them filed a chapter 7 bankruptcy. Unbeknownst to Roberts, one of the members recorded the call.

b. Applicable law.

The recording of the conference call is governed by Penal Code section 632 (section 632), which prohibits one party to a confidential communication from recording that communication without the knowledge or consent of "*all* parties." (*Id*., subd. (a), italics added.) Subdivision (c) defines "'confidential communication'" as including "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering . . . *or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded*." (Italics added.) Subdivision (d) states: "Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this

section is not admissible in any judicial, administrative, legislative, or other proceeding."[16]

c. Analysis.

Here, there is no evidence the participants of the conference call were notified it would be recorded. Further, there is no evidence the participants were informed during the call that their conversation was being recorded. The conversation between Roberts (an attorney) and the members of THV (his clients) during their conference call is confidential for purposes of section 632 because the circumstances objectively indicate any participant reasonably expected and desired the conversation itself would not be recorded. (*Id*., subd. (c); *Shulman v. Group W. Productions*, *Inc*. (1998) 18 Cal.4th 200, 234-235.)

THV argues section 632 is inapplicable because the nature of the call precludes any objectively "reasonable expectation that the conversation [was] not being overheard, as there were 6 other people in different locations, some on speaker [phones], in the conference directly hearing each other throughout the conference," and any of the participants "could call an 800 number to listen to a recording of the call." (Cf. *Kearney v. Salomon Smith Barney*, *Inc*. (2006) 39 Cal.4th 95, 117, fn. 7; *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776-777 ["'a conversation is confidential under section 632 if a

[16] Whether the right to truth-in-evidence provision, enacted in 1982 by California voters through Proposition 8, abrogates Penal Code section 632, subdivision (d)'s exclusionary rule as to criminal proceedings (Cal. Const., art. I, § 28, subd. (f), par. (2)) is currently pending before the California Supreme Court. (*People v. Guzman* (2017) 11 Cal.App.5th 184, review granted July 26, 2017, S242244.)

party to that conversation has an *objectively reasonable expectation that the conversation is not being overheard or recorded*'" (italics added)].)

We do not accept THV's argument. As used in section 632, a "confidential communication" "calls for a determination as to whether the 'circumstances . . . reasonably indicate that *any party to such communication* desires it to be confined to such parties,' or whether the circumstances are such that 'the parties to the communication may reasonably expect that the communication may be . . . recorded.'" (*Warden v. Kahn* (1979) 99 Cal.App.3d 805, 815, italics added.) Here, regardless of the medium of the communication between participants, Roberts wanted the communication to be confined to the THV members in the conference call, and he had an objectively reasonable expectation it would be confidential. The trial court therefore did not abuse its discretion in refusing to admit the transcript of the conference call into evidence.

C. The Trial Court Erred in Modifying Special Jury Instruction No. P-2 with Its Response to the Jury's Question.

THV contends the trial court's response to the jury's questions regarding one of the special jury instructions resulted in an erroneous modification of that special instruction. We agree.

1. Further procedural background and facts.

The primary focus of THV's legal malpractice claim is that Roberts negligently permitted the original target, Alatorre, to escape liability by failing to name him in the

Property action.[17] Thus, THV must prove Roberts' failure to name Alatorre as a defendant constituted legal malpractice. Also, THV must prove that its claim against Alatorre (professional negligence in the preparation of the tract map) in the Property action would have been successful. The jury received the standard instructions concerning negligence (CACI No. 400 [proof of negligence—attorneys],[18] CACI No. 400 [proof of negligence—engineers/surveyors (modified)],[19] and CACI No. 430 [causation:

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[17] During trial, THV also asserted Roberts was negligent in failing to sue Lehr, Tri Lakes, or the City (negligent approval of the tract map) and the Bank (breach of contract); however, these parties were not identified in the trial court's modification of special jury instruction No. P-2 and therefore are not relevant to our discussion.

[18] "THV Investments, LLC, claims that it was harmed by the negligence of attorney, David A. Roberts. To establish this claim, THV Investments, LLC, must prove all of the following: [¶] 1. That David A. Roberts was negligent; [¶] 2. That THV Investments, LLC, was harmed; and [¶] 3. That the negligence of David A. Roberts was a substantial factor in causing THV Investments, LLC's harm."

[19] "THV Investments, LLC, claims that it was harmed by the negligence of Alejandro Alatorre, Alatorre & Associates, TriLakes Consultants, and Greg Lehr, any of them or all of them. To establish this claim, THV Investments, LLC must prove all of the following: [¶] 1. That Alejandro Alatorre, Alatorre & Associates, TriLakes Consultants, or Greg Lehr, any of them or all of them, were negligent; [¶] 2. That THV Investments, LLC, was harmed; and [¶] 3. That the negligence of Alejandro Alatorre, Alatorre & Associates, TriLakes Consultants, and Greg Lehr, all of them or any of them, was a substantial factor in causing THV Investments, LLC's harm."

substantial factor]); professional negligence (CACI No. 600 [professional negligence (engineers/surveyors)],[20] CACI No. 600 [standard of care],[21] CACI No. 601 [damages for negligent handling of legal matter],[22] CACI No. 602 [success not required],[23] and CACI No. 603 [alternative legal decisions or strategies]);[24] and, over defendants' objection, the case-within-a-case doctrine (special jury instruction No. P-2 (P-2)).

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[20] "A professional civil engineer such as Alejandro Alatorre (Alatorre & Associates, Inc.), a professional engineering firm such as TriLakes Consultants, Inc., and a professional surveyor such as Greg Lehr, is negligent if he/it fails to use the skill and care that such reasonably careful professional would have used in similar circumstances. [¶] This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.' You must determine the level of skill and care that a reasonably careful civil engineer would use in similar circumstances based only on the testimony of the expert witnesses, Leonard Fowler and Jeremy Rappoport, who have testified in this case."

[21] "An attorney is negligent if he or she fails to use the skill and care that a reasonably careful attorney would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.' [¶] You must determine the level of skill and care that a reasonably careful attorney would use in similar circumstances based only on the testimony of the expert witnesses, including Defendant David A. Roberts, who testified in this case."

[22] "To recover damages from David A. Roberts and Caswell, Bell & Hillison LLP, THV Investments, LLC, must prove that it would have obtained a better result if David A. Roberts and Caswell, Bell & Hillison, LLP, had acted as reasonably careful attorneys."

[23] "An attorney is not necessarily negligent just because his or her efforts are unsuccessful or he or she makes an error that was reasonable under the circumstances. An attorney is negligent only if he or she was not skillful, knowledgeable, or careful as another reasonable attorney would have been in similar circumstances."

[24] "An attorney is not necessarily negligent just because he or she chooses one legal strategy and it turns out that another strategy would have been a better choice."

P-2 provides: "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." This special instruction is based on this court's decision in *Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 (*Arciniega*). In *Arciniega*, we acknowledged the general rule that the plaintiff in a legal malpractice action "'is entitled only to be made whole: i.e., when the attorney's negligence lies in his failure to press a meritorious claim, the measure of damages is the value of the claim lost.'" (*Ibid.*) However, we added that "[s]uch a rule can only withstand the test of logic if the misperforming lawyer is deemed to constitute the same 'target,' legally speaking, as the original offending defendant. Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Ibid.*)

In its closing argument, THV argued Roberts' failure to name Alatorre in the Property action caused it $2.4 million in damages, and the failure to name the Bank caused it $250,000 in damages. THV pointed out P-2, telling the jurors that this special instruction was included in the instructions because the original targets are "out of range." THV identified the original targets as Alatorre, Lehr, Tri Lakes, and the Bank, arguing "they're gone because" Roberts "didn't bring the lawsuits against them so we could do this case without it being a malpractice case, so we could have the actual

defendants here."[25] THV explained, "[t]his is the essence of the case-within-a-case doctrine. So . . . this jury instruction is the essence of what we're doing here." Defendants agreed that the target defendants are Ruiz and Alatorre.

During deliberations, the jury asked for clarification on P-2. "The Court requested the jurors to be more specific, to which they responded: 'One, is Attorney Roberts the same as the original target? Two, does Attorney Roberts take the place of the original target?'" Initially, the trial court wanted to respond as follows: "'This instruction is explanatory of the case-within-a-case doctrine and is not to be taken literally.'" However, defense counsel objected, arguing that P-2 "should never have been given" because "Roberts does not stand in the shoes of Mr. Ruiz or Mr. Clark or Mr. Alatorre because we know that they settled with Alatorre." Defense counsel conceded if the jury found that Roberts had committed malpractice by not naming Tri Lakes or Lehr, "then arguably he would be responsible for whatever damages" THV proved they had caused.

In response, THV's counsel argued the settlement of the underlying case (the Property action) is not a defense to legal malpractice; Roberts "is responsible for the damages caused by" those parties he left out of the case. There is "one verdict against all of the defendants and then the deductions take place." The trial court proposed this response to the jury's questions: "'This language is illustrative of the case within a—the idea of a case within a case. As to Question No. 1, the answer is no. As to Question No. 2, yes, but only if you find malpractice.'" Defense counsel again objected, arguing

[25] During closing argument, THV failed to identify the City as an omitted original target. Therefore, we will not include the City in our discussion.

defendants were prejudiced by the special instruction because they were precluded from informing the jury of the amount of THV's settlement with Alatorre. The court then suggested: "How about if we specify in here they're not to consider Alatorre's liability?" Defense counsel replied: "Ruiz and Clark as well, the target defendants."

THV's counsel protested, arguing the removal of Alatorre from consideration as a target defendant would not make sense since "[e]verything in this case talks about the Alatorre lawsuit, including Mr. Roberts in the letters that he wrote to the clients." THV's counsel asserted the jury had to consider Alatorre's liability because THV "did not have a clear shot at Alatorre. [THV] had a direct cause of action against Alatorre with no defenses, and [THV] ended up in a position that if [it] ended up in agreement with Ruiz, [it] would have had to take it subject to all of the defenses that Alatorre had against Ruiz, which were considerable defenses. [THV] had no clear shot. [It was] left without a lawsuit against Alatorre." THV's counsel added that if THV was awarded damages, then the trial court would deduct $400,000 (the amount of its settlement with Alatorre) from the award. The court replied: "That was the Court's understanding. We're asking for a gross amount, and from that we deduct whatever the settlement was for Alatorre."

Defense counsel maintained this is a settle-and-sue case because Alatorre settled with THV, and the trial court's rulings on various motions precluded experts from addressing the issue of whether THV would have received a better result than the settlement. The court agreed, "at least as to Alatorre." In response, THV's counsel argued defendants had the opportunity to present expert testimony but had failed to do so; however, THV offered the necessary expert opinion to support its claim against Alatorre.

Defense counsel continued to assert that THV's settlement with Alatorre, Ruiz and the Clark Trust, precluded the jury from considering them to be target defendants. THV's counsel disagreed, requesting time to brief the issue. The court denied the request, stating: "I'm not going to be here in the morning, I'm done. [¶] . . . [¶] So I don't want to leave this for Judge Oberholzer. I'd like to write something back."

The parties resumed their argument and the trial court asked if they wanted a mistrial. Defense counsel replied, "No, sir." THV's counsel replied: "I don't want you to change what's gone on here. I want you to answer No. 2 yes, he takes the place of the original target. They don't have anybody's name. And is he the same person? No, he's not." The court reiterated its concern that the jury was taking the instruction too literally. It suggested answering the second question with "'[y]es, if you find that he committed malpractice.'" Defense counsel replied: "The problem with that, your Honor, is if they're thinking in terms of Ruiz and Clark and Alatorre, those are all target defendants. If they conclude he committed legal malpractice, then they say, well, he stands in the shoes of all those people. Therefore, the damages are $2.4 million. That's not the law. That's not the state of the evidence. They have to determine if he committed legal malpractice and for what." Later, defense counsel added: "If the Court does not correct this, the jurors could conclude, well, he stands in the shoes of the target defendants. Ruiz and Clark and Alatorre were responsible for 2.4, so the verdict should be 2.4. [¶] We all know in this courtroom the testimony was that that delay was caused by Ruiz, Clark, and Alatorre. . . . [¶] . . . [¶] So if there's going to be any damages, if the legal malpractice is found, it has to be for the failure to sue Tri Lakes and the failure to sue Lehr. Their

damages are nominal or nothing." Defense counsel then suggested the following response: "'You're not to consider—he does not stand in the shoes of Ruiz, Clark, or Alatorre."

THV's counsel replied that Roberts is not in the shoes of Ruiz, but he is in the shoes of the Clark Trust, Alatorre, Tri Lakes, and Lehr. Counsel argued: "All of those insurance carriers you're unable to get to, and you ended up with people that were indigent or going into bankruptcy. He did a great job of avoiding litigation in this case. That's exactly what he did. He avoided litigation against people that were going to stand up and fight. And all of these—read the instructions. Alatorre is within the instructions over and over again. Now is not the time to pull him out. It's gone to the jury." Over THV's counsel's objection, the trial court responded to the jury's questions by answering, "No," to the first question, and "Yes, only if you find Roberts committed malpractice—the 'target' defendant does not include Ruiz, Clark and Alatorre" to the second question.

After instructing the jury that the target defendants did not include Ruiz, the Clark Trust, or Alatorre, Judge Ottolia went on vacation, and Judge Oberholzer presided over deliberations. Judge Oberholzer stated the following: "The Court has received a note from the jury. I'm going to read the note to you. The note reads, 'Concerning Question 2 on the verdict form, when considering causation: Substantial factor. One, is the Court referring to the original harm to THV Investments, the map? Two, if not, is the Court referring to the actual harm David Roberts caused?' [¶] . . . [T]he answer to this would be with respect to the first question, is the Court referring to the original harm to THV Investments, the map, the answer is yes. [¶] Also as to Question 2, is the Court referring to the actual harm David

Roberts caused, and the answer to that is also yes. [¶] With respect to the harm that David Roberts caused, it's not to include Ruiz, Clark, or Alatorre as previously instructed by Judge Ottolia."

Following further deliberations, the jury returned its verdict awarding $250,000 in damages to THV; however, the trial court offset this award by the amount of THV's settlement with Alatorre ($400,000).

2. THV's contention.

THV contends the trial court's answer to the jury's questions (Alatorre is not a target defendant) amounted to an incorrect statement of law, effectively "remov[ing] the jury and substitut[ing the trial court] as trier of fact on the central disputed issue between the parties concerning [defendants'] liability for malpractice in failing to include Alatorre as a defendant in the [Property action]." We agree.[26]

3. Standard of review.

"'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her] which is supported by substantial evidence.' [Citation.] 'The propriety of jury instructions is a question of law that we

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[26] Defendants argue the invited error doctrine bars THV's complaint of the trial court's modification of P-2 because the special instruction, proposed by THV over defendants' objection, was "hopelessly vague and improperly presupposed a breach of the standard of care." We conclude the invited error doctrine does not apply here because THV did not err in proposing "P-2 without defining what 'original target' meant or identifying which 'original target' correlated to which underlying defendant." P-2 correctly defined the scenario of a "case-within-a-case," and THV identified the target defendants in other jury instructions and during closing argument. (*Arciniega*, *supra*, 52 Cal.App.4th at p. 231; also, see discussion regarding offset, *post*.)

review de novo.'" (*Yale v. Bowne* (2017) 9 Cal.App.5th 649, 656-657.) "[W]e view the evidence in the light most favorable to the claim of instructional error. [Citations.] In other words, we assume the jury might have believed the evidence favorable to the appellant and rendered a verdict in appellant's favor on those issues as to which it was misdirected." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 845-846.)

However, erroneous civil instructions may "cause actual prejudice, depending on their nature and context. Particularly serious forms of error might 'almost invariably' prove prejudicial in fact. But it does not follow that courts may 'automatically and monolithically' treat a particular category of civil instructional error as reversible per se. Article VI, section 13 of the California Constitution requires examination of each individual case to determine whether prejudice actually occurred in light of the entire record." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580 (*Soule*).) "A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" (*Ibid*.)

4. Analysis.

To prove its legal malpractice claim against defendants for failing to assert any claim against Alatorre in the Property action, THV had to successfully prove that Alatorre was responsible for the defective tract map. In other words, THV had to prove a case-within-a-case. While the jury was initially instructed on the case-within-a-case approach, the trial court's answer to the jury's second question abandoned this approach

in favor of the "settle-and-sue case" method advanced by defense counsel. This change resulted in instructional error. In a "settle and sue" case, a disgruntled client claims the underlying case was worth more than what his or her attorney settled for. (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 157 ["basis of the claim is that the settlement was less than it should have been, or more than it had to be, by reason of the negligence of the party's attorney"].) Here, THV does not contend the settlement with Ruiz, the Clark Trust and Alatorre was inadequate. Rather, it claims Roberts was negligent by failing to sue Alatorre, Lehr, Tri Lakes based on their responsibility for the defective tract map, and by failing to sue the Bank based on its breach of the terms of the construction loan and enforcement of allegedly sham guarantees.

"[W]hen the [attorney] malpractice involves negligence in the prosecution or defense of a legal claim, the case-within-a-case method is appropriately employed. [Citation.] Thus, when a client seeks to recover damages for his attorney's negligence in the prosecution or defense of the client's claim, the client must prove that 'but for that negligence a better result could have been obtained in the underlying action. [Citation.] "An attorney malpractice action then, involves a suit within a suit, a reconsideration of the previous legal claim, and only by determining whether or not the original claim was good can proximate damages be determined." [Citation.] This trial within a trial avoids the specter that the damages claimed by a plaintiff are a matter of pure speculation and conjecture.'" (*California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey* (2000) 84 Cal.App.4th 702, 710-711, disapproved on another ground in *Viner v. Sweet*, *supra*, 30 Cal.4th at p. 1244, fn. 5.)

According to THV's trial theory, Alatorre was negligent in preparing the tract map, Roberts was negligent for failing to name Alatorre in the Property action and, but for Roberts' negligence, a better result could have been obtained in the Property action. The jury was tasked with deciding both cases of negligence: Alatorre's negligent preparation of the tract map (the case) and Roberts' negligent failure to name Alatorre in the Property action (within-a-case). In order to prove Alatorre's professional negligence (the case), THV presented the testimony of three experts: Jeremy Rappoport testified that Alatorre failed to meet the standard of care by failing to meet the timeline of providing an approved final tract map, and by providing a defective map. Leonard Fowler testified that neither the tract map preparation nor the survey[27] in this case met the applicable standard of care. And, Jules Kamin calculated THV's lost profit damages to be $2,417,497. The jury was instructed that the testimony of experts Fowler and Rappoport was uncontradicted and could not be rejected.[28] In order to prove Roberts' negligence (within-a-case), Wallace testified that Roberts' representation of THV fell below the standard of care because he failed to name Alatorre as a defendant in the Property action.

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[27] Alatorre signed the tract map as a surveyor.

[28] In relevant part, the jury was instructed: "During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial. [¶] The expert testimonies of Leonard Fowler & Jeremy Rappoport with respect to the standard of care were uncontradicted by any other expert witness. Therefore, you may not reject their testimony. Their testimony is conclusive. [¶] With respect to the other experts, you do not have to accept their opinions. . . ." (CACI No. 219 [expert witness testimony (modified)].)

A review of the record reveals that THV tried this case as a "case-within-a-case" without any restriction. When defendant moved, in limine, to have the Property action identified as a "settle-and-sue" case due to the $400,000 settlement between THV and Alatorre (see *Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th 154), the trial court denied the motion. From opening statements, through the presentation of evidence, THV pursued its theory that it was injured as a result of Roberts' failure to press meritorious claims against Alatorre, Tri Lakes, Lehr, and the Bank. (*Arciniega*, *supra*, 52 Cal.App.4th at pp. 221-222 [""'When an attorney's negligence lies in his failure to press a meritorious claim, the measure of damages is the value of the claim lost. If the injury occurred because of his negligence in handling litigation, the measure of direct damage is the difference between the amount of actual judgment obtained and the judgment that should have been recovered[."] [¶] . . . [¶] Thus, it is the function of the malpractice cause of action to compensate the plaintiff for what he or she would have recovered but for the attorney negligence. The attorney thus steps into the shoes of the original tortfeasor.'"].) The jury was instructed that THV's claims involved a "case-within-a-case" and THV argued the case as such. However, when the jury asked for clarification of P-2, the trial court's response misstated the law and was in conflict with the other instructions. By removing Alatorre from the list of target defendants, the court renounced the "case-within-a-case" approach and discredited the instructions which conformed to THV's trial theories. In short, the trial court erred in modifying P-2.

The question is whether the error was prejudicial. We conclude it was. "Instructional error in a civil case is prejudicial 'where it seems probable' that the error

'prejudicially affected the verdict.' [Citations.] Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury." (*Soule*, *supra*, 8 Cal.4th at p. 580.) In determining whether instructional error is prejudicial, we "evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580-581.) Our evaluation of the record persuades us that the instructional error was prejudicial.

As previously noted, THV tried its claims against defendants as a "case-within-a-case" without any restriction. The jury, however, was instructed not to consider Ruiz, the Clark Trust, and Alatorre, the primary parties[29] responsible for the defective tract map which caused $2.4 million in damages, in arriving at a verdict. Thus, the jury was left with only one target defendant, the Bank. The primary claim THV raised against the Bank was its action on THV's members' personal guarantees. That action resulted in THV being "out an additional $250,000" to indemnify Hedberg who paid the same amount to settle the Bank's claim.

In short, although the trial court gave a correct general instruction on the "case-within-a-case" scenario, its more specific modification to P-2 deprived THV of the instructional support necessary for its case against Alatorre, foreclosing a verdict for THV on such theory. As such, the erroneous modification of P-2 must be considered prejudicial, and the verdict, tainted by the erroneous instruction, must be reversed.

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[29] The evidence presented by THV against Lehr, Tri Lakes and the City regarding their responsibility for the defective tract map was limited.

D. The Trial Court Did Not Err in Refusing to Instruct the Jury on Gradsky *Waivers.*

Arguing that the evidence shows the real property was sold at a private trustee's sale on April 1, 2011, and its members' guarantees were executed contemporaneously with the deed of trust, promissory note, and construction loan agreement, THV contends the trial court erred in refusing to give its proposed instruction entitled, "'CACI 300 (Modified): breach of contract personal guarantee for investment in real property' (the 'Guaranty Instruction')."[30] According to THV, the guaranty instruction would have told the jury that, as a matter of law, the personal guarantees were "sham" because they were unenforceable after the Bank's nonjudicial foreclosure sale on April 1, 2011. Because of the legal and factual issues raised during the trial, we conclude the court did not err in refusing to instruct the jury on *Gradsky* waivers.

1. Further procedural background and facts.

The Bank loaned money to THV, an LLC, for its residential construction project. As additional security, members of THV personally guaranteed the loan. Following its nonjudicial foreclosure of the loan, the Bank sued the members based on their personal guarantees, and thereafter accepted $250,000 in settlement of its claim. THV argued

[30] The proposed "CACI 300 (Modified)" is not included in the record; however, the jury was instructed with CACI No. 300 as follows: "[THV] claims that it and [the Bank] entered into a contract for a construction loan to build residential homes. [¶] [THV] claims that it and [the Bank] breached this contract by ceasing funding under their construction loan agreement. [¶] [THV] also claims [the Bank's] breach of this contract caused harm to plaintiff for which [the Bank] should have paid. [¶] Defendant, [Roberts], denies plaintiff's above claims."

Roberts was negligent in defending the members against the Bank's claim because he failed to challenge the personal guarantees as being "sham" and unenforceable.

Roberts, Wallace, and Hansen testified about guaranty law, *Gradsky* waivers, and the sham guaranty doctrine, providing their opinions on THV's members' liability for the Bank's loan based on their execution of personal guarantees. Relying on the holding in *Gradsky* and subsequent case law, THV requested "that the court instruct the jury that the guarantees had no lawful object after the trustee's non-judicial foreclosure sale on April 1, 2011, and that, therefore, the members had no personal liability under the guarantees after April 1, 2011."

Defendants opposed the request, arguing: (1) the sham guaranty is the subject of a "separate and distinct case pending" in Fresno involving the same parties; (2) the personal guarantees were not void and unenforceable because the members are true guarantors, not borrowers; (3) the guaranty instruction misstates the facts and the law; (4) the waivers of the antideficiency protections were properly executed; (5) THV's case law is distinguishable; (6) the issues relating to a sham guaranty are questions of fact for the jury; and (7) *Gradsky* is not settled law.

The trial court rejected the guaranty instruction on the grounds it would invade the province of the jury by deciding a question of fact, to wit, whether the personal

guarantees were enforceable,[31] and the law relating to a sham guaranty is unsettled.

2. Applicable law.

A "guarantor is one who promises to answer for the debt" or perform the obligation of another when the person who is ultimately liable fails to pay or perform. (Civ. Code, § 2787.) California's antideficiency statutes afford protections to borrowers; however, historically, courts have not applied those statutes to guarantors. (See, e.g., *Bank of America etc. Assn. v. Hunter* (1937) 8 Cal.2d 592; *Mariners Sav. & Loan Assn. v. Neil* (1971) 22 Cal.App.3d 232.)

Since the decision in *Gradsky, supra*, 265 Cal.App.2d 40, California courts have acknowledged at least one antideficiency protection for guarantors: Code of Civil Procedure section 580d. In *Gradsky*, a property owner/debtor obtained a construction loan, secured with a first trust deed on the property, from the plaintiff bank/creditor. (*Gradsky*, at p. 41.) As additional security for the loan, the defendant general contractor/guarantor guaranteed the debtor's note. (*Ibid.*) When the debtor defaulted on the loan, the creditor foreclosed the trust deed nonjudicially and then sued the guarantor for the unpaid balance. (*Id.* at p. 42.) The *Gradsky* court held that the "creditor's recovery is not directly barred by section 580d of the Code of Civil Procedure. It is barred by applying the principles of estoppel. The estoppel is raised as a matter of law to

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[31] "It's a question of fact for the jury. In fact, from hearing Mr. Tutt's deposition, he changed a few of the dates as to when THV was created and when the guaranties were signed. I think there's an issue of fact that the jury has to decide, whether or not THV is a separate entity. If it is a separate entity, then, as Mr. Hansen said, it's perfectly permissible to sign a guaranty and to waive your rights pursuant to [Code of Civil Procedure section] 580d."

prevent the creditor from recovering from the guarantor after the creditor has exercised an election of remedies which destroys the guarantor's subrogation rights against the principal debtor. The destruction of the guarantor's subrogation rights follows from the combination of the creditor's election to subject the security to nonjudicial sale and the operation of [Code of Civil Procedure] section 580d, which prevents both the creditor and the guarantor from obtaining any deficiency judgment against the debtor after nonjudicial sale of the security." (*Gradsky*, at p. 41.) However, the *Gradsky* court agreed that the guarantor can waive this defense (*Gradsky* waiver) based upon the creditor's election to pursue the remedy of nonjudicial foreclosure on the security. (*Id.* at p. 48.)

Following the *Gradsky* decision, lenders routinely included *Gradsky* waivers in their standard form guaranty contracts. In 1996, Civil Code section 2856 "was enacted in response to the holding in *Cathay Bank v. Lee* (1993) 14 Cal.App.4th 1533 . . . , which imposed stringent requirements on the wording and interpretation of a guarantor's waiver of a defense arising from the principal's rights under the antideficiency statutes." (*Gramercy Investment Trust v. Lakemont Homes Nevada, Inc.* (2011) 198 Cal.App.4th 903, 911.) Subdivision (f) of Civil Code section 2856 states: "The validity of a waiver executed before January 1, 1997, shall be determined by the application of the law that existed on the date that the waiver was executed." Because the *Gradsky* waiver at issue in this case was executed after 1997, it is subject to the rules of Civil Code section 2856.

"Civil Code section 2856 provides that any guarantor or other surety, including a guarantor of a note secured by real property, may waive rights and defenses that would otherwise be available to the guarantor. [Citation.] Waivable defenses include the

guarantor's rights of subrogation, reimbursement, indemnification, and contribution (Civ. Code, § 2856, subd. (a)(1)); any rights or defenses the guarantor might have by reason of any election of remedies by the creditor (Civ. Code, § 2856, subd. (a)(2)); or any rights or defenses the guarantor might have because the principal's obligation is secured by real property or an estate for years (Civ. Code, § 2856, subd. (a)(3)). These statutory rights of the guarantor may be waived and such waiver provision is not invalid as opposed to public policy. [Citations.] [¶] However, a guarantor cannot be held liable where a contract is unlawful or contravenes public policy. [Citation.] The rule against enforcement of illegal transactions is founded on considerations of public policy that are independent of Civil Code sections 2809 and 2810. [Citation.] Following this reasoning, it has been held that a predefault waiver of notice by a guarantor is unenforceable as void. [Citation.] [¶] . . . Civil Code section 2856 [does not] permit a lender to enforce predefault waivers beyond those specified, where to do so would result in the lender's unjust enrichment, and allow the lender to profit from its own fraudulent conduct. [¶] . . . [T]herefore . . . a guarantor's waiver of defenses is limited to legal and statutory defenses expressly set out in the agreement. A waiver of statutory defenses is not deemed to waive all defenses, especially *equitable defenses*, such as unclean hands, where to enforce the guaranty would allow a lender to profit by its own fraudulent conduct. The doctrine of unclean hands bars a plaintiff from relief when the plaintiff has engaged in misconduct relating directly to the transaction concerning which suit is brought. [Citation.] Although originally an equitable defense, it may apply to legal claims, as well." (*California Bank & Trust v. DelPonti*, *supra*, 232 Cal.App.4th at pp. 166-167.)

3. Analysis.

"Although a party is entitled to have his theory of the case submitted to the jury in accordance with the evidence and the court must, when requested, instruct on all the vital issues involved [citations], the trial court is not required to, nor should it on its own motion, give instructions which are not correct statements of the law." (*Hardin v. Elvitsky* (1965) 232 Cal.App.2d 357, 372.)

Contrary to THV's assertions, the validity of its members' waivers is determined by the application of Civil Code section 2856, not the law (including case law such as *Gradsky*) that existed prior to January 1, 1997. (Civ. Code, § 2856, subd. (f).) The statute sets forth the manner in which a guarantor may effectuate a waiver of certain rights and defenses and provides that those rights and defenses waived "include, but are not limited to, any rights or defenses that are based upon . . . Section . . . 580d . . . of the Code of Civil Procedure." (Civ. Code, § 2856, subd. (c).) Here, THV was set up as an LLC, "an entity distinct from its members." (Corp. Code, § 17701.04, subd. (a).) THV borrowed the money from the Bank for its construction project, and its members, as individuals, each signed a commercial guaranty. The evidence therefore supports a finding that the members were not the primary obligors of the construction loan from the Bank, but rather were true guarantors who were not protected by the antideficiency laws.

As guarantors, the members could waive the protections afforded by Code of Civil Procedure section 580d.[32] (Civ. Code, § 2856.) THV's contrary claim misstates the law.

Notwithstanding the above, there were factual issues that required the jury's resolution in connection with its determination of the validity of the THV members' waivers. Specifically, there was conflicting evidence as to whether (1) the Bank required the THV members to form an LLC to obtain the construction loan; (2) the Bank required the members to sign personal guarantees for the loan; and (3) the Bank's refusal to honor THV's construction vouchers from Spring 2008 to September 20, 2008, contributed to THV's default. (*California Bank & Trust v. DelPonti*, *supra*, 232 Cal.App.4th at p. 167 ["A waiver of statutory defenses is not deemed to waive all defenses, especially *equitable defenses*, such as unclean hands, where to enforce the guaranty would allow a lender to profit by its own fraudulent conduct."].) These factual issues alone sufficiently support the trial court's decision to deny THV's request to instruct the jury on *Gradsky* waivers.

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[32] In relevant part, Code of Civil Procedure section 580d provides: "(a) Except as provided in subdivision (b), no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or mortgage on real property . . . in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust. [¶] (b) The fact that no deficiency shall be owed or collected under the circumstances set forth in subdivision (a) does not affect the liability that a guarantor, . . . or other surety might otherwise have with respect to the deficiency . . . ."

E. The Trial Court Erred in Offsetting the Damages Awarded with the Alatorre Settlement.

Finally, THV contends the trial court erred by offsetting the jury's award of $250,000 (based on Hedberg's indemnification claim against THV) with the $400,000 THV received from Alatorre in settlement. We agree.

1. Further procedural background and facts.

As previously noted, THV filed two separate legal malpractice actions against defendants: the underlying Riverside action and the Fresno action. In the Riverside action, THV sought to recover $2.4 million in damages because of Roberts' failure to name those parties responsible for the defective tract map and delay in completing the construction project, and $250,000 in damages because of Roberts' negligent representation of THV and its members in their dealing with the Bank and in the Bank's action on the personal guarantees. THV's claims against defendants regarding the Bank are also the subject of the Fresno action. Of the parties not named in the Property action (Alatorre, Lehr, Tri Lakes, and the City), THV settled its claim against Alatorre for $400,000.

Due to the number of defendants who allegedly caused injury to THV in the Property action and the Bank action, and the different sets of damages caused by each of the defendants in the cases, the jury was instructed on the two different underlying cases, and THV requested the trial court instruct with P-2 and provide the jury with a special

verdict form directing the jurors on the application of P-2.[33] Regarding THV's claim of legal malpractice involving the Property action, the special verdict form asked the jury to answer the following questions:

"1. Was the engineer, Alejandro Alatorre (Alatorre & Associates), negligent?"

"2. Was the engineering firm, TriLakes Consultants, Inc., negligent?"

"3. Was the surveyor, Greg Lehr, negligent?"

"If you answered NO to ALL of the above questions, then go to Question No. 7. If you answered YES to any of the above questions, then answer the following question."

"4. Was the negligence of any of the above persons or entities a substantial factor in causing harm to plaintiff, THV Investments, LLC?"

"If you answered NO to Question No. 4, then go to Question No. 7. If you answered YES to Question No. 4, then answer the following question."

"5. Was attorney, David A. Roberts, negligent in not including one or more of the above persons or entities as defendants in the lawsuit of THV Investments, LLC vs. Ruiz and the Clark Trust?"

"If you answered NO to Question No. 5 then go to Question No. 7. If you answered YES to Question No. 5 then answer the following question."

"6. What was the amount of economic loss to THV Investments, LLC as a result of the negligence of attorney, David A. Roberts, in not including one or more of the

[33] On July 25, 2017, we granted THV's motion to augment the record to include its special verdict form.

above persons or entities as defendants in the lawsuit of THV Investments, LLC vs. Ruiz and the Clark Trust?"

"7. Did 1st Centennial Bank breach its construction loan agreement with plaintiff, THV Investments, LLC?"

"If you answered NO to Question No. 7, then go to Question No. 10. If you answered YES to Question No. 7, then answer the following question."

"8. Was attorney, David A. Roberts, negligent in not including 1st Centennial Bank as a defendant in the lawsuit of THV Investments, LLC vs. Ruiz and the Clark Trust?"

"If you answered NO to Question No. 8, then go to Question No. 10. If you answered YES to Question No. 8, then answer the following question."

"9. What was the amount of economic loss to THV Investments, LLC as a result of the negligence of attorney, David A. Roberts, in not including 1st Centennial Bank as a defendant in the lawsuit of THV Investments, LLC vs. Ruiz and the Clark Trust?"

Regarding THV's claim of legal malpractice involving the Bank action, the special verdict form asked the jury to answer the following questions:

"10. Was attorney, David A. Roberts, negligent in advising the members of THV Investments, LLC that they had no possible defenses against the loan guarantees they signed?"

"If you answered NO to Question No. 10, then go to Question No. 12. If you answered YES to Question No. 10, then answer the following question."

"11. What was the amount of economic loss to THV Investments, LLC as a result of the negligence of attorney, David A. Roberts, in advising the members of THV Investments, LLC that they had no possible defenses against the loan guarantees they signed?"

Defendants objected to the special verdict form, arguing "[t]here does not have to be a determination of negligence" because Alatorre settled with THV. In response, THV maintained that to prove Roberts' negligence, it had to prove its "underlying case" of "THV versus Ruiz/Clark Trust." In order to prove its underlying case, the jury had to decide whether Alatorre, Lehr and Tri Lakes were negligent, and whether the Bank breached the loan agreement. Finally, THV asserted the jury had to determine whether Roberts was negligent in advising the members of THV that they "had no defenses" in the guarantees in order for the jury to award $250,000, the amount paid in settlement of the Bank's claims against the members, "which THV agreed to indemnify Mr. Hedberg for." Defendants reiterated their objection, claiming THV's "reasoning is flawed," and its general verdict form "solves all the problems." The trial court denied THV's request for a special verdict form in favor of defendants' general verdict form. As previously discussed, the court later modified P-2 to preclude the jury from considering Ruiz, the Clark Trust, or Alatorre as target defendants in arriving at a verdict regarding the defective tract map, which caused $2.4 million in damages. Thus, the jury was left with three target defendants (Lehr, Tri Lakes, & the Bank), none of whom were identified as the primary cause of THV's $2.4 million in damages. However, the Bank was identified

as the primary cause of the $250,000 in damages based on THV's indemnification of its members' liability on the personal guarantees.

The general verdict form given to the jury failed to distinguish the underlying cases and claims against the various target defendants, the various forms of malpractice committed by defendants, or the different sets of damages suffered by THV. Rather, the jury was asked to answer the following questions:

"1. Did David A. Roberts and his firm, Caswell, Bell & Hillison, fall below the standard of care regarding the legal services they rendered to plaintiff, THV Investments, LLC?"

"2. Was the breach of the standard of care by defendants, David A. Roberts and Caswell, Bell & Hillison's, [*sic*] a substantial factor in causing harm to plaintiff, THV Investments, LLC?"

"3. What is plaintiff, THV Investments, LLC's damages?"

The jury answered, "Yes," to questions 1 and 2, and awarded damages in the amount of $250,000.

After the jury returned its verdict awarding $250,000 in damages to THV, defendants requested a credit of $400,000, the amount THV received when it settled its claim against Alatorre. The trial court granted the request, reduced the $250,000 award to $0, and declared defendants to be the prevailing parties under Code of Civil Procedure section 1032.

2. Analysis.

We review a ruling granting or denying a motion for offset under an abuse of discretion standard. (*Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1504-1505.)

Here, THV raised two separate claims of malpractice (two separate causes of action) and sought different awards of damages (based on two separate harms) against defendants. In one claim, THV alleged it was damaged in an amount of $2.4 million based on Roberts' failure to name Alatorre as a defendant in the Property action. In the other claim, THV alleged it was damaged in an amount of $250,000 based on Roberts' erroneous legal advice in the Bank action regarding THV's members' personal guarantees. However, the jury was not allowed to consider both claims of malpractice. When the trial court modified P-2, it instructed the jury not to consider Ruiz, the Clark Trust and Alatorre as target defendants, precluding the jurors from considering THV's claim of $2.4 million in damages. We presume the jurors followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852; *Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1308; *People v. Beach* (1983) 147 Cal.App.3d 612, 625 ["In the absence of evidence to the contrary, the presumption [that the jury adhered to the limiting instructions] will control."].) Thus, the jury was left with only one claim of legal malpractice, namely THV's claim of $250,000 in damages based on its indemnification of its members' payment to the Bank in settlement of their personal guarantees.

Since the jury was not allowed to award any damages based on the harm THV suffered because of Alatorre's alleged professional negligence, the trial court abused its

discretion in offsetting the $250,000 award, which was based on the harm THV suffered in the Bank's action, with Alatorre's settlement payment of $400,000, which was based on the harm THV suffered in the Property action.

III. DISPOSITION

The judgment is reversed. Appellant THV Investments, LLC, is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.